SERVED: August 2, 1995

NTSB Order No. EA-4385

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of July, 1995

PETER BRENDON DOCHERTY Applicant, v. DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	)	Docket 206-EAJA-SE-13599

OPINION AND ORDER

The Administrator has appealed from the initial decision of Administrative Law Judge William R. Mullins, served October 4, 1994, granting applicant $14,132.81 in attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504.[1] The Administrator challenges the number of attorney hours claimed in applicant's EAJA application as unreasonable, and

[1] A copy of the initial decision is attached.

maintains that the award is excessive. As discussed below, the Administrator's appeal is granted as to $522.50 of the claimed attorney fees, but is otherwise denied. In addition, applicant may submit a supplemental request for fees and expenses incurred in this EAJA action.

Background

This EAJA action arises from an emergency order, issued by the Administrator on March 22, 1994, seeking revocation of applicant's commercial pilot certificate pursuant to 14 C.F.R. 61.15(d),[2] based on his having sustained three alcohol-related driving convictions within a period of three years. The first conviction (in March 1992) had been the subject of an earlier FAA enforcement action -- handled by the FAA's Aeronautical Center -- which resulted in a 30-day suspension of applicant's certificate, for his failure to report the conviction as required by section

[2] **§ 61.15 Offenses involving alcohol or drugs.**

* * *

(d) Except in the case of a motor vehicle action that results from the same incident or arises out of the same factual circumstances, a motor vehicle action occurring within 3 years of a previous motor vehicle action is grounds for --

* * *

(2) Suspension or revocation of any certificate or rating issued under this part.

"Motor vehicle action" is defined in section 61.15(c) as: "A conviction after November 29, 1990, for the violation of any Federal or state statute relating to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug," or a cancellation, suspension, revocation, or denial of driving privileges related to such operation of a motor vehicle.

61.15(e). The second conviction (in September 1992) gave rise to another enforcement action -- handled by the FAA's Central Region -- in which the FAA sought to suspend applicant's certificate for 120 days based on his having sustained two convictions within three years. However, at the informal conference held in that case, attorneys for the Administrator were persuaded by applicant's description of the events underlying the second conviction that it should not be considered under section 61.15(d). Inexplicably, however, the Administrator issued a final order suspending applicant's certificate for 30 days based on the same allegations relied on in the first case.

At the time of the informal conference in the second enforcement action, applicant informed the appropriate FAA offices, both orally and in writing, that he had sustained yet a third conviction (in June 1993). Further, the 30-day suspension order issued in the second action indicated that it was based on, among other things, "information provided by you and your attorney [at the informal conference]." Applicant argued that the Administrator was therefore estopped from separately pursuing enforcement action based on the third conviction. Nonetheless, the Administrator maintained that the 30-day suspension order in that case disposed of only the original allegations in that case, i.e., only those relating to applicant's first two convictions.

The emergency order in this case was issued by the FAA's Aeronautical Center some seven months after the FAA became aware of applicant's third conviction. The emergency order cited all

three of applicant's convictions, including the second one which had apparently been deemed inappropriate for enforcement action, at least by attorneys in the FAA's Central Region. At the hearing in this case, the law judge dismissed the order as stale, finding that the allegation of lack of qualification was a pretext. He also held that the Administrator was precluded from pursuing this enforcement action based on the doctrines of res judicata and collateral estoppel. The Administrator did not appeal the law judge's initial decision. This EAJA claim followed.

Applicant's EAJA claim

The Administrator has not appealed from the law judge's finding that the Administrator lacked substantial justification in this case. He challenges only the amount of the award. Specifically, the Administrator contends that: 1) applicant's statement of fees and expenses -- which lists daily attorney-time totals, often for multiple tasks performed -- is not sufficiently itemized to allow an analysis of the reasonableness of the time spent on each item; 2) some of the attorney services were not accurately reported on the statement; 3) two attorneys were not necessary in this case; 4) the total time assertedly spent by applicant's attorneys was excessive given the nature and complexity of the case; 5) the expenses claimed are not compensable.

Applicant argues that we need not address any of the

Administrator's substantive arguments because the Administrator's answer to the EAJA application was filed two days late. Our rules provide that "failure to file an answer within the 30-day period [after service of an EAJA application] may be treated as a consent to the award requested." However, the initial decision does not indicate whether the law judge relied on this section in granting the EAJA award, and we will not assume that he did. Accordingly, we will address each of the Administrator's substantive contentions.

1) Itemized statement. Applicant's attorneys submitted a bill for services containing daily lists of activities performed by each attorney, and their time totals. For example, an entry for April 1, 1994, reads:

> Draft letter to FAA surrendering client's Airman Certificate; draft Notice of Appeal; travel to Westlaw; legal research at Westlaw regarding FAR 61.15; travel from Westlaw to office.
> SEM [Susan E. McKeon] 2.90 hours

And an entry for April 11, 1994 reads:

> Meet with client; research cases on res judicata, laches and estoppel; several conferences with Sue McKeon to discuss Answer; draft Answer including motion to dismiss, finalize and file.
> KSJ [Kent S. Jackson] 8.50 hours

Clearly, it would have been easier to evaluate the reasonableness of applicant's claim for attorney fees if the bill revealed the amount of time spent on each individual task. While that sort of detailed breakdown is preferable, our rules require only that an "itemized statement" be submitted, "showing the hours spent in connection with the proceeding by each individual,

a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable." 49 C.F.R. 826.23. The statement submitted in this case is not so clearly deficient that it should be rejected for lack of additional specificity.[3]

2) Alleged billing inaccuracies. Counsel for the Administrator questions the general accuracy of applicant's bill for attorney fees, citing four allegedly inaccurate items. We agree with the Administrator's attention to this detail. However, because none of the alleged inaccuracies resulted in any increased charges to applicant, we are unwilling to use them to demonstrate general unreliability in the bill.

Specifically, counsel for the Administrator challenges a telephone conference which was billed to applicant on April 1, 1994, but which actually occurred the day before. He disputes the accuracy of another telephone conference billed to applicant on April 25, 1994, because, according to his records, he participated in two phone calls, not one, with Mr. Jackson (applicant's attorney) on that day. Finally, he suggests that Ms. McKeon (applicant's other attorney), who was listed in the bill as having drafted two short documents on April 1, 1994, did

[3] Such a statement does, however, preclude an exact re-calculation of fees when some of the tasks listed in an aggregate entry are found to be inappropriate or excessive for EAJA recovery. Accordingly, an applicant who submits this type of bill will not be heard to complain that the number of hours assigned to the rejected portion of an aggregate entry is inaccurate.

not actually draft those documents, but merely typed them for Mr. Jackson.[4] If true, this would only mean that applicant should have been billed at Mr. Jackson's higher hourly rate for drafting those documents. Therefore, the discrepancy, if any, served only to lower applicant's bill.

3) Necessity of two attorneys. The Administrator objects strenuously to the inclusion of Ms. McKeon's time in this EAJA award, arguing that her involvement was not necessary to applicant's case. The Administrator asserts that Mr. Jackson is highly knowledgeable and experienced in FAA enforcement matters, and did not need any assistance in this case. Accordingly, the Administrator suggests that the 52.4 hours billed by Ms. McKeon, as well as the time Mr. Jackson spent discussing the case with Ms. McKeon, were useful only as "associate training," and should not be paid for by the Government.

Mr. Jackson responds that two attorneys were necessary because of time pressures caused by the Administrator's use of expedited emergency procedures in this case. He asserts that Ms. McKeon did extensive legal research which he did not have time to do, and then briefed him on the results. He also points out that because Ms. McKeon's time is billed at a lower rate, it was more economical for her to do the basic research and drafting.

In our judgment, the use of two attorneys to defend against this emergency action was not per se unreasonable. Nor are we

[4] This argument is based on the fact that the initials "KSJ/sem" appear at the bottom of one of those documents.

convinced, as the Administrator contends, that it was purely a training exercise for Ms. McKeon. We see no reason to disbelieve Mr. Jackson's assertion that she assisted him by performing necessary pre-trial research and drafting, and we will allow applicant to recover fees billed for her performance of those functions. However, Mr. Jackson did not attempt to rebut the Administrator's additional assertion that Ms. McKeon's presence at the hearing was unnecessary, and should not be compensable under the EAJA. Accordingly, we will subtract $522.50 from the law judge's EAJA award, for the 5.5 hours applicant was billed for Ms. McKeon's attendance at the hearing.

4) Reasonableness of amount of time spent. The Administrator argues that the number of attorney hours spent on this case (77.6 hours by Mr. Jackson and 52.4 hours by Ms. McKeon) was excessive, and suggests that in view of Mr. Jackson's recognized expertise much of the review and research listed in his bill was unnecessary. In reply, Mr. Jackson denies that his expertise in aviation law obviated the need to do further research, and states that several unusual issues were presented in this case which required research.[5] He also points out that section 61.15(d) is a relatively new regulation, and there is no

[5] Specifically, he asserts that: 1) the Administrator's position in this case (that applicant lacked qualifications due to his violation of section 61.15(d)), was at odds with the position he took in promulgating that regulation; 2) counsel for the Administrator inadvertently breached his own attorney-client privilege by not completely obscuring important sanction recommendation information in the enforcement investigative report; and 3) the use of the emergency authority in this case was an attempt to circumvent our stale complaint rule.

precedent directly dealing with the appropriate sanction for three convictions in three years. Accordingly, he asserts it was necessary to search for potentially analogous cases under section 61.15(a), dealing with drug convictions.

We are not persuaded that the time spent on this case was excessive. Despite the Administrator's characterization of almost every entry on applicant's bill for legal services as unnecessary or inappropriate, we do not view the total of 124.5 attorney-hours spent on this case as excessive or abusive.[6] Nor do we think that the time assertedly spent by the Administrator's counsel preparing for the hearing (27.75 hours) necessarily provides a standard for judging the reasonableness of applicant's attorneys' preparation time.

5) Expenses. Finally, the Administrator argues that $274.27 in expenses[7] should not have been included in the law judge's EAJA award because our case law requires a supporting affidavit indicating that such costs are normally billed

[6] This total takes into account our subtraction of the 5.5 hours billed for Ms. McKeon's attendance at the hearing, discussed above.

[7] The disputed expenses, listed on applicant's attorney bill as "disbursements," are as follows: Postage, $20.02; Photocopies, $81.20; Faxes, $24.00; Courier, $33.06; Mileage, $8.70; Westlaw, $107.29.

The Administrator takes particular exception to the $8.70 mileage expense, arguing that "local travel" is not compensable under the EAJA under any circumstances. However, we see no reason to view mileage any differently than the other charged expenses.

separately.[8] Applicant has not submitted such a supporting affidavit. However, in his reply to the FAA's answer to the EAJA application, applicant's counsel stated that, "[l]ike any other attorney in private practice, we bill for postage, photocopies, faxes, courier expenses, mileage, and Westlaw services." In view of the unexceptional nature of the claimed expenses, we will treat this statement as the equivalent of the required affidavit, and permit recovery of the expenses.

Although we have not agreed with the Administrator on many of the arguments before us here, we do continue to encourage his detailed review of EAJA claims.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted to the extent that the law judge's EAJA award is reduced by $522.50, and is denied in all other respects;

2. The law judge's EAJA award is modified to $13,610.31; and

3. Applicant's request for permission to supplement his application to include fees and expenses incurred in this EAJA action is granted.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.

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[8] In Administrator v. Conner Air Lines, Inc., 6 NTSB 1046 (1989), we noted that Board precedent permitted EAJA recovery for expenses such as photocopying, postage, telephone, and secretaries, "if supported by an affidavit stating that these items are normally billed separately."